

In the Matter of the Compensation of
PAUL R. SADLER, Claimant

WCB Case No. 22-02398

ORDER ON REVIEW

Julene M Quinn LLC, Claimant Attorneys

SAIF Legal Salem, Defense Attorneys

Reviewing Panel: Members Ousey and Curey.

Claimant requests review of Administrative Law Judge (ALJ) Quan's order that affirmed an Order on Reconsideration that: (1) affirmed the Notice of Closure's medically stationary date; (2) affirmed the Notice of Closure's temporary disability award; and (3) awarded 8 percent whole person impairment for a right knee condition and 16 percent work disability for cervical conditions. On review, the issues are issue preclusion, medically stationary date, temporary disability, and permanent disability (impairment and work disability). We modify in part and affirm in part.¹

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

On August 1, 2018, claimant sustained a compensable cervical injury while mowing a golf course. (Exs. 1, 11, 22). The SAIF Corporation initially accepted the claim for a cervical strain. (Ex. 22).

On January 15, 2019, claimant began treating with Dr. Yundt, who became his attending physician. (Exs. 12, 18-4). Dr. Yundt diagnosed upper extremity radiculopathy, C3 and C4 central cord syndrome, and myelomalacia of the cervical cord. (Ex. 12-2). On April 11, 2019, Dr. Yundt performed a C3-4 posterior decompression with laminectomy and "foramotomy." (Ex. 18).

¹ We adopt and affirm those portions of the ALJ's order concerning issue preclusion, medically stationary date, and permanent disability benefits. *See Hicks v. SAIF*, 194 Or App 655, 659-60, *recons*, 196 Or App 146 (2004) (absent persuasive reasons to the contrary, we are not free to disregard a medical arbiter's findings); *Gaylen J. Kiltow*, 64 Van Natta 1136, 1144-45, *recons*, 64 Van Natta 1296, 1299-300 (2012) (Board declined to address contentions regarding "residual functional capacity" when first raised on review). In doing so, we note that claimant did not raise his contentions regarding the work disability "social-vocational" factors before the ALJ. Under these particular circumstances, we decline to deviate from our general practice of not considering issues raised for the first time on review. *See Stevenson v. Blue Cross*, 108 Or App 247 (1991) (Board can refuse to consider issues on review that are not raised at hearing); *Fister v. South Hills Health Care*, 149 Or App 214 (1997) (absent adequate reason, Board should not deviate from its well-established practice of considering only those issues raised by the parties at hearing).

On July 3, 2019, SAIF modified its acceptance to include cervical cord syndrome at C3, cervical cord syndrome at C4, and C3-4 myelomalacia of the cervical cord. (Ex. 25).

On December 10, 2019, Dr. Rosenbaum, a neurosurgeon who examined claimant at SAIF's request, considered claimant's accepted conditions to be medically stationary, and he did not anticipate the need for additional treatment related to those conditions. (Ex. 40-8-10).

On January 7, 2020, Dr. Yundt indicated that claimant was near medically stationary status and that a physical capacity evaluation would help determine his permanent impairment and work capabilities for claim closure. (Ex. 42).

Between January 13, 2020 and October 19, 2021, Dr. Yundt referred claimant for ongoing treatment for cervicgia, neck pain, radiculopathy, C3-4 and C4-5 spondylosis and facet syndrome, and C5-6 and C6-7 stenosis. (Exs. 43, 51, 55, 63, 64, 69, 72).

Meanwhile, on March 10, 2020, Dr. Yundt reviewed Dr. Rosenbaum's December 2019 report, agreeing that claimant's accepted conditions were medically stationary. (Ex. 47-1).

On September 11, 2020, Ms. Kadlecik performed a Work Capacity Evaluation (WCE) to assess claimant's residual functional capacity. (Ex. 56). On October 26, 2020, Dr. Yundt concurred with the WCE report. (Ex. 58-2).

On November 10, 2020, SAIF issued a Notice of Closure that found claimant's conditions medically stationary as of December 10, 2019, awarded temporary total disability benefits from April 11, 2019 through December 10, 2019, and awarded 40 percent permanent impairment and 55 percent work disability. (Ex. 59). Both claimant and SAIF requested reconsideration of the closure notice. (Ex. 60).

A December 16, 2020, Order on Reconsideration set aside the November 2020, closure notice as premature. (*Id.*)

On January 18, 2021, Dr. Yundt confirmed that he did not anticipate further objective improvement of claimant's accepted conditions and that claimant's conditions remained medically stationary as of December 10, 2019. (Ex. 61-1).

On August 31, 2021, Dr. Yundt released claimant to work as a Service Advisor, which was a “light” work occupational opportunity offered to claimant as part of a vocational rehabilitation program or an authorized training program (ATP). (Ex. 70).

On September 27, 2021, claimant became actively enrolled and engaged in the ATP. (*See* Ex. 78-1-2). Claimant ended his participation in the ATP on November 17, 2021. (*Id.*) SAIF paid temporary partial disability benefits for this period. (*Id.*)

On February 1, 2022, Dr. Yundt reviewed video footage of claimant taken on November 29, 2021, and continued to opine that he was medically stationary as of December 10, 2019. (Ex. 77-1).

A February 15, 2022, Notice of Closure awarded 22 percent whole person impairment for claimant’s spinal cord and cervical spine and 34 percent work disability. (Ex. 78). It also listed claimant’s medically stationary date as December 10, 2019, and found him entitled to temporary total disability benefits from April 11, 2019 through December 10, 2019, as well as temporary partial disability benefits from September 27, 2021 through November 17, 2021 (for the duration of the ATP while the claim was in open status), less time worked. (Ex. 78-1-2). Both claimant and SAIF requested reconsideration, where (among other issues) claimant requested a medical arbiter examination and asserted entitlement to temporary disability benefits ongoing from April 11, 2019. (Exs. 79, 80).

On May 9, 2022, claimant underwent a medical arbiter examination. (Ex. 81).

A May 24, 2022, Order on Reconsideration modified the February 2022 closure notice. (Ex. 82). The Appellate Review Unit (ARU) found that claimant’s accepted conditions were medically stationary as of December 10, 2019, based on the opinion of Dr. Rosenbaum and Dr. Yundt’s March 2020 and February 2022 concurrences. (Ex. 82-2). The ARU modified the Notice of Closure’s temporary disability dates, finding that such benefits were authorized for one day on November 27, 2018, as well as from April 11, 2019 (the surgery date) through December 10, 2019 (the medically stationary date), less time worked. (Ex. 82-3). In reaching this conclusion that removed the ATP temporary partial disability entitlement, the ARU noted that, under OAR 436-030-0036(2), claimant was not entitled to any temporary disability award for any period of time in which he was medically stationary. (Ex. 82-2). The ARU also reduced claimant’s permanent disability awards to 8 percent permanent impairment and 16 percent work disability. (Ex. 82-3-4).

CONCLUSIONS OF LAW AND OPINION

The ALJ affirmed the Order on Reconsideration's temporary disability award. In doing so, the ALJ found claimant "medically stationary" as of December 10, 2019. Moreover, the ALJ concluded that ORS 656.268(10) did not apply, despite claimant's participation in an ATP from September 27 through November 17, 2021, because the February 2022 closure notice had not issued before claimant participated in the ATP.

On review, claimant asserts entitlement to temporary disability benefits while participating in the ATP from September 27 through November 17, 2021.² In response, SAIF asserts that claimant is not entitled to any benefits beyond his medically stationary date. For the following reasons, we agree with claimant.

Claimant has the burden of establishing entitlement to temporary disability benefits. ORS 656.266(1); *Lisa M. Guerrero*, 62 Van Natta 1805, 1821 (2010). As the party challenging the Order on Reconsideration, it is also claimant's burden to establish error in the reconsideration process. ORS 656.283(6); *Marvin Wood Prods. v. Callow*, 171 Or App 175, 183 (2000); *Javon L. Washington*, 72 Van Natta 200, 200 (2020).

Generally, a worker is not entitled to temporary disability benefits after the medically stationary date. *See* OAR 436-030-0036(2);³ *Kevin W. McClellan*, 65 Van Natta 560, 563 (2013) (awarding temporary disability benefits only until the claimant's condition became medically stationary). However, ORS 656.268(10) provides an exception to this rule. *See* OAR 436-030-0036(2); *Atchley v. GTE Metal Erectors*, 149 Or App 581, *rev den*, 326 Or 133 (1997) ("post-closure" ATP-related temporary disability benefits are "substantive" because they result from an explicit entitlement, and do not depend on the claimant's "medically stationary" status).

ORS 656.268(10) provides, in relevant part:

² Claimant also challenges the ALJ's determination that he was "medically stationary" on December 10, 2019, and, therefore, that he was not entitled to ongoing temporary disability benefits after that date through the commencement of ATP. We adopt and affirm the ALJ's reasoning regarding this issue.

³ OAR 436-030-0036(2) provides: "Except as provided in section (3) of this rule and ORS 656.268(10), a worker is not entitled to any award of temporary disability for any period of time in which the worker is medically stationary."

“If, after the notice of closure issued pursuant to this section, the worker becomes enrolled and actively engaged in training according to rules adopted pursuant to ORS 656.340 and 656.726, any permanent disability payments due for work disability under the closure shall be suspended, and the worker shall receive temporary disability compensation and any permanent disability payments due for impairment while the worker is enrolled and actively engaged in the training. When the worker ceases to be enrolled and actively engaged in the training, the insurer or self-insured employer shall again close the claim pursuant to this section if the worker is medically stationary * * *. The closure shall include the duration of temporary total or temporary partial disability compensation.”

In *Intel Corp. v. Batchler*, 267 Or App 782, 786 (2014), the court noted that, under ORS 656.268(10), a claimant who is enrolled and actively engaged in ATP is entitled to receive temporary disability compensation. The court explained that ORS 656.268(10) contains two substantive rules:

“First, it explains the conditions that must exist for a claimant to be eligible for training-related temporary disability compensation: a notice of closure must have been issued and the worker must become enrolled and actively engaged in training in accordance with the Department of Consumer and Business Services’s rules. Second, it explains what a worker must do to continue to receive training-related temporary disability compensation: remain ‘enrolled and actively engaged in the training.’”

Id. at 788.

The *Batchler* court went on to discuss ORS 656.340(12), which provides that “a worker actively engaged in training may receive temporary disability compensation for a maximum of 16 months. The insurer or self-insured employer may voluntarily extend the payment of temporary disability compensation to a maximum of 21 months.” *Id.* Stating that ORS 656.340(12) and ORS 656.268(10) were reconcilable, the court concluded that:

“ORS 656.268(10) establishes when a worker becomes eligible for training-related temporary disability compensation and provides that the worker is entitled to receive those benefits while the worker is enrolled and actively engaged in training; ORS 656.340(12) says nothing about the conditions of eligibility, but provides a cap on the duration of benefits.

“Together, those two statutes establish the following scheme: (1) a worker will become eligible for training-related temporary disability compensation when her claim is closed and she begins an authorized ATP; (2) a worker may receive temporary disability compensation for as long she is ‘actively engaged’ in her ATP; (3) those payments may not, however, continue for more than 16 months during that period of eligibility unless an extension is approved by the insurer or self-insured employer, and in no event for more than 21 months.”

Id. at 789.

Applying *Batchler*’s reasoning to this case, in order to be eligible for temporary disability benefits for his ATP, claimant must show that a notice of closure had issued before the ATP and that he was actively enrolled and engaged in the ATP. Under these particular circumstances, we find that those requirements are met.

On November 10, 2020, SAIF issued a Notice of Closure. (Ex. 59). The issuance of that closure notice took place before the commencement of claimant’s ATP on September 27, 2021. (Ex. 78-1-2). Although the November 2020 closure was subsequently rescinded as premature, the express language of ORS 656.268(10) has been satisfied. *See Bergerson v. Salem-Keizer School District*, 341 Or 401, 413 (2006) (we generally assume that the legislature has given words of common usage their plain, natural, and ordinary meanings); *see, e.g., Gaylen J. Kiltow*, 67 Van Natta 639 (2015) (the Board applied ORS 656.268(10) to find the claimant entitled to post-closure ATP-related temporary disability benefits where the initial closure had been rescinded by ARU when the claimant began participation in ATP and was subsequently reinstated before the end of ATP). Therefore, the first requirement has been met.

Moreover, there is no dispute that claimant’s ATP was approved and that he was actively engaged in the ATP on September 27, 2021, which ended on November 17, 2021. Therefore, the second requirement has been met.

Based on the foregoing reasons, claimant has established entitlement to additional temporary disability compensation from September 27 through November 17, 2021. *See* ORS 656.268(10); OAR 436-120-1443(12).⁴ Therefore,

⁴ OAR 436-120-1443(12) provides:

“The insurer must pay the worker temporary disability compensation, under ORS 656.268 and 656.340, when the worker is actively engaged in an approved training plan and there is a Form 1081, ‘Training Plan,’ signed by the worker, the insurer, and the counselor who developed the plan.”

claimant has established error in the reconsideration process. *Callow*, 171 Or App at 183. Accordingly, we modify that portion of the ALJ's order.⁵

Claimant's counsel is entitled to an assessed attorney fee for his services at the hearing level and on review regarding the ATP-related temporary disability issue. *See* ORS 656.383(2). Claimant has requested "bifurcation" of the attorney fee award from the merits of the temporary disability issue. *See* OAR 438-015-0125. Under such circumstances, we award a reasonable assessed fee, in an amount to be determined in Workers' Compensation Board (WCB) Case No. 23-00004BF (payable by SAIF) after this order becomes final.

ORDER

The ALJ's order dated November 30, 2022, is modified in part and affirmed in part. Claimant is awarded additional temporary partial disability benefits from September 27, 2021 through November 17, 2021. For services at the hearing level and on review concerning this issue, claimant's attorney is awarded an assessed fee, payable by SAIF, to be determined in WCB No. 23-00004BF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on November 21, 2023

⁵ In reaching this conclusion, we acknowledge that the November 2020 Notice of Closure was ultimately rescinded. Therefore, the February 2022 Notice of Closure is considered a post-ATP closure, but also a closure of the initial claim pursuant to ORS 656.268(1). Accordingly, the ALJ's evaluation of permanent impairment and work disability benefits was justified. *See, e.g., Gary W. Fallis, Jr.*, 69 Van Natta 1734, 36-38 (2017) (claim closure requirements for ORS 656.268(1) and (10) both applied where the claim was reopened for a new or omitted medical condition before an ATP and remained opened after the claimant ceased participation in the ATP).